STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

LULA ELEZOVIC,

Plaintiff-Appellant,

and

JOSEPH ELEZOVIC,

Plaintiff,

-vs-

FORD MOTOR COMPANY and DANIEL P. BENNETT, Jointly and Severally,

Defendants-Appellees.

_____/

Supreme Court No. 125166

Court of Appeals No. 236749

Lower Court No. 99-934515-NO

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. THE MICHIGAN STATUTE WHICH PROHIBITS SEXUAL HARASSMENT IN THE WORKPLACE PROVIDES A CAUSE OF ACTION AGAINST AN INDIVIDUAL RESPONSIBLE FOR SUCH HARASSMENT.

The first issue raised in this appeal concerns the liability of Daniel Bennett under the Michigan statute which prohibits sexual harassment in the workplace, MCL 37.2202(1). This issue turns on the statutory definition of "employer" provided in MCL 37.2201(a).

The Court of Appeals ruled in *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464; 652 NW2d 503 (2002), that this statutory definition of "employer" did not encompass a claim against the individual responsible acts of sexual harassment. Bennett argues in his Brief on Appeal that this Court, in essence, anticipated the *Jager* decision in its 2000 decision in *Chambers v Trettco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000). Ford arrives at this conclusion based on a single sentence in the *Chambers* opinion, which indicates that in MCL 37.2201(a), "the statute expressly addresses an employer's vicarious liability for sexual harassment committed by its employees." 463 Mich at 310.

This statement in the *Chambers* decision was addressed to the issues brought before the Court in that case - when a corporate employer could be found responsible based on principles of *respondeat superior* for sexual harassment committed in its workplace. This statement, however, does not address the issue which is before the Court herein. This case presents the question of whether individuals responsible for sexual harassment may be sued under Michigan's statute which prohibits such harassment.

Interestingly, the *Chambers* Court did, in fact, weigh in on the issue which is before the Court in this case. In so doing, the *Chambers* Court clearly rejected the conclusion ultimately reached by

the Court of Appeals in *Jager*. In *Chambers*, the Court's majority responded to criticisms of its decision in the dissenting opinion with the following:

> In reality, employers are *equally* prohibited from engaging in hostile environment sexual harassment and quid pro quo sexual harassment; both of these types of harassment encompass a spectrum of misconduct from least to most egregious. To categorize a given pattern of misconduct as only of the type that possibly gives rise to a claim of hostile environment harassment does not mean that the misconduct is less egregious than other harassment. Rather, *it simply allows this Court to determine whether the sexual harasser's employer, **in addition to the sexual harasser himself**, is to be held responsible for the misconduct.*

Id. at 320 (emphasis added).

As the italicized portion of this quotation demonstrates, the majority in *Chambers* clearly assumed that individual employees could be sued for sexual harassment under Michigan's Civil Rights Act.

Plaintiff would acknowledge that this Court's decision in *Chambers* does not control the resolution of the issue presented in this case for the simple reason that the issue involved herein was not presented to the Court in *Chambers*. But, if the Court were to adopt Bennett's argument that *Chambers* should direct the outcome of this case, the Court must decide this issue in favor of the plaintiff.

Bennett also contends that the language of MCL 37.2201(a) is not unambiguous and, therefore, is presumably subject to some amount of judicial interpretation. MCL 2201(a) represents a legislatively chosen definition of a word, "employer", used in other provisions of the Elliott-Larsen Act. That Act prohibits an "employer" from engaging in various forms of sexual discrimination, including sexual harassment. MCL 37.2202(1); MCL 37.2103(j). When the word "employer" is used in this Act in proscribing certain conduct, a court is compelled to define that word as the

Legislature has chosen to define it. *Tryc v Michigan Veterans Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Thus, when the Act prohibits an *employer* from discriminating against a person on the basis of sex, the word "employer" must mean "a person who has 1 or more employees, *and includes an agent of that person.*" MCL 37.2201(a). There is no ambiguity in this definition. The word "employer" as used in the Elliott-Larsen Act is defined as an entity which has one or more employees. The word "employer" is also defined as including "an agent of that person."

Bennett argues that the language of MCL 37.2201(a) can be read in more than one way. Bennett asserts that one possible way in which the statute could be read so as not to impose liability on an individual agent is the following:

> First, it can be read as ensuring that an employer does not escape liability be arguing that it was not the employing entity that discriminated – its agent was. Read in this manner, *because the agent who discriminates equates with the "employer," the employer will be held vicariously liable.*
>
> Defendant's Brief, p. 11.

Bennett posits that MCL 37.2201(a) could have been designed to equate a corporate employer with its agent. Thus, Bennett argues that the real reason for the inclusion of the words "an agent of that person" in the definition of "employer" found in MCL 37.2201(a) was to denote vicarious liability. This argument, however, assumes that the Michigan Legislature was sufficiently dense that it felt that it had to include language in the Elliott-Larsen Act providing that corporate employers could be held responsible for the acts of its agents. Since even Bennett must acknowledge that corporations act only through their agents, Defendant's Brief, p. 18, it is difficult to understand why the Michigan Legislature would have felt compelled to add the final clause of MCL 37.2201(a) if it only wished to denote vicarious liability.

The defendant's vicarious liability justification for the final seven words contained in MCL 37.2201(a) also does damage to the literal text of that statute. Again, it must be stressed that the statute is a definitional section, defining "employer" as a person who has one or more employees and further indicating that the term "employer" "includes an agent of that person." Notably, this definition does not refer to the *conduct* of an agent, which might support the vicarious liability theory proposed by Bennett. Thus, the statute does *not* provide that an employer means a person who has one or more employees, and includes *the acts of* an agent of that person. Such language might give weight to the argument Bennett advances herein. But, that is not the way that MCL 37.2201(a) is drafted. Instead, the statute refers to the definition of "employer" as including an agent of the employing entity.

Finally, this Court must consider the serious ramifications which would follow if Bennett's vicarious liability theory of MCL 37.2201(a) were deemed correct. Bennett's brief identifies the most significant of these ramifications very well when he asserts therein that, based on his construction of MCL 37.2201(a), "because the agent who discriminates *equates* with the 'employer', the employer will be held vicariously liable." Defendant's Brief, p. 11. Thus, as Bennett acknowledges, if its explanation of the final clause of MCL 37.2201(a) were accepted, the purpose of this provision was to *equate* the acts of discrimination committed by defendant's agents with the liability of the employing entity.

In other words, to accept the reasoning offered by Bennett as to the real purpose behind MCL 37.2201(a), this Court would have to re-examine everything that it has previously written on the subject of the vicarious liability of an employing entity for sexual harassment committed by its agents in the work force. If, as defendant is now willing to argue, the whole purpose of MCL

37.2201(a) was to *equate* the conduct of an agent with the legal responsibility of a corporate employer, this Court must re-examine and reverse *Chambers*, a case in which this Court expressly ruled that sexual harassment committed by a corporation's agent could not equate with the liability of a corporate defendant for that misconduct.

This Court need not engage in an extensive review of its past precedents addressed to the issue of *respondeat superior* for the reason that Bennett's construction of MCL 37.2201(a) is wrong. But, if Bennett were correct, this Court's prior decisions regarding *respondeat superior* liability in the context of sexual harassment cases would have to be re-examined and substantially modified.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S EXCLUSION OF EVIDENCE CONCERNING BENNETT'S 1995 CONVICTION FOR INDECENT EXPOSURE AND FORD'S KNOWLEDGE OF THAT CONVICTION.

Plaintiff has also challenged on appeal the circuit court's decision excluding evidence of Bennett's arrest and conviction for indecent exposure arising out of an incident that occurred on I-275 on August 23, 1995.

Ford argues on appeal that the sexual misconduct which led to Bennett's conviction was off premises, off duty and involved non-Ford employees. Thus, Ford claims that this evidence was irrelevant.

As discussed in the *amicus curiae* brief filed by the Michigan Conference of the National Organization of Women (NOW), *et al.*, there is some dispute over the question of whether Bennett was engaged in "work related" conduct while driving a Ford vehicle on I-275 on August 23, 1995. NOW Brief, pp. 25-26. But, whether Bennett or was not engaged in some work-related activity at the time he masturbated in front of several teenagers is entirely irrelevant. What is relevant about

this evidence is that Ford had knowledge of the sexual misconduct for which Bennett was later convicted.

Ford ultimately obtained a directed verdict in this case on the grounds that it could not be held vicariously liable for the sexual harassment perpetrated by Bennett on Mrs. Elezovic. As defendant concedes in its brief, this Court in *Chambers*, "forcefully reaffirmed the cardinal principle that employer liability under Elliott-Larsen is predicated on employer *fault* and that it is Plaintiff's burden to prove employer *fault*." Defendants' Brief, p. 27 (emphasis in original). Plaintiff concurs with this assessment of the Court's decision in *Chambers*.

In *Chambers*, the plaintiff argued that the corporate defendant should be found responsible for the acts of harassment committed by one of its agents (Wolshon). The majority in *Chambers* concluded its opinion by summarizing the circumstances under which a corporate entity could be found liable for acts of sexual harassment committed by one of its agents:

> Whether defendant can be held responsible for acts perpetrated by Wolshon turns on: (1) the nature of defendant's relationship with Wolshon; and (2) *any failings on the part of defendant that contributed to Wolshon's success in harassing plaintiff.*
>
> 463 Mich at 325 (emphasis added).

Thus, as this Court expressly held in *Chambers*, a corporate employer may be found liable under the civil rights act for *any failings* on its part that contributed to an agent's success in harassing another employee. Under the tests set out by this Court in *Chambers*, the circuit court serious erred in excluding at trial evidence of Bennett's sexual misconduct during the I-275 incident and Ford's knowledge of that misconduct.

Ford's knowledge of the fact that one of its male supervisors had engaged in this bizarre

sexual misconduct, even if it occurred outside the work setting, could properly be the basis for a jury's finding that Ford was "required under a standard of reasonable care to take steps for the protection of likely future victims." *Ferris v Delta Air Lines, Inc.*, 277 F3d 128, 137 (2nd Cir 2001).

However, even if Bennett's misconduct was not, in and of itself, sufficient to affix fault against Ford for the serial acts of workplace sexual harassment later committed by Bennett, the fact remains that Ford's knowledge of the August 23, 1995 incident and Bennett's criminal conviction resulting from that incident represented critical evidence in assessing what a reasonable employer should have known with respect to Bennett's harassment of Mrs. Elezovic. As this Court made clear in *Chambers*, this inquiry must be "accomplished by objectively examining the totality of the circumstances." 463 Mich at 319. The "totality of the circumstances" bearing on what a reasonable employer in Ford's position should have known simply cannot be examined without reference to Bennett's sexual misconduct associated with the I-275 incident and his conviction for indecent exposure.

III. THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT ON MRS. ELEZOVIC'S CLAIMS FOR SEXUAL HARASSMENT BASED ON THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT.

Finally, Ford asserts that the trial court did not err in granting it a directed verdict on the issue of *respondeat superior*. In making this argument, Ford relies heavily on the formulation of the vicarious liability element of a sexual harassment claim contained in the Court of Appeals' decision in *Sheridan v Forest Hills Public Schools*, 247 Mich App 611; 637 NW2d 536 (2001). As noted in plaintiff's original brief, *Sheridan* is a post-*Chambers* case which somewhat mysteriously reintroduced to Michigan law a version of the *respondeat superior* element in a sexual harassment

claim which predated *Chambers*. Under *Sheridan*'s analysis, a plaintiff may only succeed in affixing liability on a corporate entity for sexual harassment in the workplace if the plaintiff establishes either that she reported the harassment to an "appropriate supervisor", *id* at 625, or by showing "pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.*, p. 627.

Sheridan cannot be harmonized with this Court's decision in *Chambers*. In determining the *respondeat superior* element of a sexual harassment claim, *Chambers* mandates an objective determination of the entirety of the facts to determine what a reasonable employer should have know with respect to sexual harassment occurring in its workplace. As noted previously, the ultimate goal of this *respondeat superior* inquiry is to determine if there is "fault" which a jury might affix against the corporate employer. *Chambers*, 463 Mich at 312. Thus, the inquiry focuses on whether there were "any failings on the part of the defendant that contributed to the [sexual harasser's] success in harassing the plaintiff."

The fluid *respondeat superior* determination assessed on the totality of the facts as called for by this Court's decision in *Chambers* differs dramatically from the fixed and limited version of *respondeat superior* described by the Court of Appeals in *Sheridan*. Contrary to the *Sheridan* decision, a trier of fact assessing the *respondeat superior* element of a sexual harassment claim is not to confine itself to whether the plaintiff actually reported harassment to an "appropriate supervisor", or whether there was evidence of "pervasive" harassment. Instead, *Chambers* called for consideration of a totality of the circumstances for the purposes of determining whether a reasonable employer should have known of the harassment and should have taken steps to prevent it.

The totality of the evidence presented in this case created an issue of fact on the question of Ford's *respondeat superior* liability. The evidence at trial established that before Mrs. Elezovic filed this case, another employee, Justine Muldonado, complained to the plaint's labor relations department that Bennett has exposed himself to her. (Apx. pg. 171a-172a). Since liability may be imposed on Ford for "any failings . . . that contributed to [Bennett's] success in harassing plaintiff," *Chambers*, 463 Mich at 325, Ford's lack of response to Ms. Muldonado's complaints against Bennett constitutes a pertinent piece of evidence with respect to Ford's *respondeat superior* liability. Such a rule of law is consistent with a long line of federal precedents which have recognized that an individual's harassment of other female employees may put the employer of notice that sexual harassment of the plaintiff is taking place. *See Hurley v Atlantic City Police Department*, 174 F3d 95, 110 (3rd Cir 1999); *Dees v Johnson Controls World Services, Inc.*, 168 F3d 417, 423 (11th Cir 1999); *Hirase-Doi v U.S. West Communications, Inc.*, 61 F3d 777, 783-784 (10th Cir 1995); *Hunter v Allis Chalmers Corporation*, 797 F2d 1417, 1424 (7th Cir 1986).

In addition to this testimony, plaintiff also presented evidence that Mrs. Elezovic did, in fact, report Bennett's sexual misconduct which occurred in the workplace to two of her supervisors. While Mrs. Elezovic requested that this information be kept confidential because of her fear of Bennett, the individual to whom she reported the harassment had a duty under Ford's own policies to pursue her claims further. *See also Torres v Pisano*, 116 F3d 625, 639 (2nd Cir 1997) (recognizing that circumstances exist in which sexual harassment reported in confidence must be investigated further.

The "reasonableness inquiry" called for by *Chambers* - the determination of what a reasonable employer under the totality of the circumstances should have known and should have

done - is a determination which is normally reserved for the trier of fact. Here, construing the evidence presented at trial in the light most favorable to the plaintiff, *Kubczak v Chemical Bank & Trust Co.*, 456 Mich 653, 663; 575 NW2d 745 (1998), the jury had sufficient evidence before it from which it could have concluded that a reasonable employer should have been aware of the probability that Bennett was engaged in acts of sexual misconduct that a reasonable employer was at fault for failing to act on that knowledge.

RELIEF REQUESTED

Based on the foregoing, Plaintiff-Appellant, Lula Elezovic, respectfully requests that this Court grant reverse the Court of Appeals' decision and remand this case to the Wayne County Circuit Court for further proceedings.

Respectfully submitted,

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